

SERVED: October 20, 2004

NTSB Order No. EA-5118

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of October, 2004

MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17087
v.)	
)	
GARY D. COLLEY,)	
)	
Respondent.)	
)	

ORDER DENYING RECONSIDERATION

On consideration of the respondent's petition for reconsideration of Board Order No. EA-5099 (served June 14, 2004)¹ and the Administrator's response in opposition, we have concluded that the petition, which for the most part repeats and expands upon arguments concerning service that were previously considered and rejected, neither establishes error in our original decision nor otherwise presents a valid basis for

¹Respondent's pleading is styled a petition for rehearing. We have treated it as a petition for reconsideration since there was no hearing before the law judge.

reconsidering it.²

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's petition for reconsideration is denied.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above order. HERSMAN, Member, submitted the following concurring statement.

Concurring Statement of Member Hersman

Since arriving at the National Transportation Safety Board three months ago, there have been a number of cases in which timely filing, or the lack thereof, has been the deciding factor in the disposition of the cases. The decision the Board Members have been asked to make is whether or not the regulatory authority and the respondent have complied with the outlined process. Generally this process has been determined by, and is clearly understood by, government officials who have longstanding experience and knowledge of the system, the procedures, and the precedents. It appears, at least in the cases I have reviewed in the last three months, that the respondents do not have the same understanding of the system, and in particular that they are not fully cognizant of the importance of the timely filing requirement.

There are several issues that I would like to raise with respect to the existing process: 1.) service of process, 2) timeliness/deadlines, 3.) merits of the case. First, with respect to service issues, respondents in Administrator v. Tu and Administrator v. Colley raise concerns about the methods of service utilized by the Federal Aviation Administration. In Tu there were different and inconsistent methods utilized to contact the respondent. For example, certified and first class mail were used in the various attempts to contact the respondent, at times both methods were employed by the FAA and at other times only one method was used. In Colley, the respondent raises Section 821.8

²Section 821.57(d) of the Board's Rules of Practice provides, in relevant part, that "[t]he only petitions for rehearing, reargument, reconsideration or modification of an order which the Board will entertain ... are those based on the ground that new matter has been discovered." Because the respondent's appeal was dismissed by the law judge on the procedural ground that it was untimely, the allegedly "new matter" referenced in his petition may not be considered, as it relates solely to the unlitigated merits of the Administrator's order of emergency revocation.

(d)(1) and (d)(2), addressing the presumption of lawful service:

Section 821.8 (d) Presumption of Service. There shall be a presumption of lawful service:

- (1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under Section 821.7(f); or
- (2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered, or certified mail, has been returned as unclaimed or refused.

It is essential that federal authorities have the ability to serve complaints, but a respondent cannot file a timely appeal if they are unaware of the charge against them, specifically if they have not been served.

Second, with respect to timeliness and deadlines, the fact that a response is required within 10 days for emergency action or 20 days of service of the complaint is based on the date of mailing, not on the date of service. This item is critical and I believe often misunderstood. I am aware that the FAA and the Safety Board are making efforts to clarify this in their communications with respondents, but the fact the the 10 or 20 day clock starts ticking upon the date of mailing, not the date of receipt, creates a much abbreviated timeline for response. In *Administrator v. Harris*, it was alleged by the respondent that the emergency order was received 7 days into the 10 day appeal period. Given the mobility of the population that these regulations are intended to cover and the time that it may take for them to receive the complaint, it may be impractical to assume that pro se respondents have an opportunity to prepare a formal response or to hire counsel to file a response during the established time frame, as was alleged in *Harris*.

Finally, on the third point, I understand that early in the Board's history, there was a preference for deciding cases on the merits. After many years of this practice a decision requiring respondents to show "good cause" for missing deadlines was strictly adhered to, thereby resulting in findings against citizens because of lack of compliance with the process not due to the lack of merits. If a respondent files a tardy appeal because they did not have the complaint in their possession in time to meet the deadline, I question if the standard for presumption of service is appropriate. If the Safety Board has reversed its practice of deciding cases on merit because of decisions made by the courts, then we must ensure that the service of complaints is fair and efficient because the very nature of the process may result in citizens not being afforded due process.

In closing, I do want to acknowledge the importance of having a workable system. It is important that all of the regulatory agencies take appropriate and necessary action to ensure the safety of our transportation system. We expect and rely on their enforcement activities to address unsafe operators or unsafe operations. I do not advocate any diminution of their authority. However, I remain concerned that the communication methods and the complaint and appeal process from the respondent's point of view are opaque. Every effort should be made to provide citizens with due process and it is incumbent on all of us involved in enforcement proceedings to review the systems that have been established and ensure that they are fair and reasonable. I will look for opportunities to address this matter in future cases before the Board.